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IN THE

Supreme Court of the United States

October Term, 1974

No. .....

BUILDING OWNERS & MANAGERS ASSOCIATION
OF METROPOLITAN DETROIT,
BOOK BUILDING CO.,
COMFORD INVESTMENT CO.,
FISHER NEW-CENTER CO.,
FORT STREET REALTY CO.,
GUARDIAN BUILDING CORPORATION,
WASHINGTON BOULEVARD BUILDINGS, INC.,
WINEMAN INVESTMENT CO.,

On behalf of themselves and all other users of Detroit Edison Company steam heat in the metropolitan Detroit area

CITY OF DETROIT,
COUNTY OF WAYNE,
ATTORNEY GENERAL OF THE
STATE OF MICHIGAN

Petitioners,

vs.

THE DETROIT EDISON COMPANY

and

MICHIGAN PUBLIC SERVICE COMMISSION

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Petitioners pray that a writ of certiorari issue to review the Order of the Supreme Court of the State of Michigan entered on July 24, 1974.

OPINIONS BELOW

The Opinion and Orders of the Ingham County Circuit Court of the State of Michigan, the Orders of the Court of Appeals of the State of Michigan and the Order of the Supreme Court of the State of Michigan are all unreported, but are attached to this application as Appendices A-E.

JURISDICTION

The Ingham County Circuit Court's Opinion and Order Granting Plaintiffs' Motion for Summary Judgment in Part (Appendix A) is dated April 11, 1973 and was entered on that date.

The Ingham County Circuit Court's Opinion and Order Denying Plaintiffs' Motion for Supplemental Order (Appendix B) is dated January 11, 1974 and was entered on that date.

The Order of the Court of Appeals of the State of Michigan denying petitioners' Application for Leave to Appeal (Appendix C) is dated April 19, 1974 and was entered on that date.

The Order of the Court of Appeals of the State of Michigan dismissing petitioners' Claim of Appeal (Appendix D) is dated May 9, 1974 and was entered on that date.

The Order of the Supreme Court of the State of Michigan denying petitioners' Application for Leave to Appeal (Appendix E) is dated July 24, 1974 and was entered on that date.

Jurisdiction of this Court is invoked pursuant to 28 USC § 1257(3), this being an appeal which draws into question rights claimed by petitioners under the Constitution of the United States.

QUESTION PRESENTED

The state court made an express finding that an order of a state administrative agency permitting an increase in the

rates charged by a public utility to its consumers had been issued in violation of due process because the consumers had not been given prior notice of the hearings held on the rate increase request. The question presented is whether the state court making such a finding may then refuse to order an immediate refund of the rate increases collected under the invalid and unconstitutional agency order, may remand the proceeding to the agency for the introduction of petitioners' proofs several years after the initial rate determination and may allow the utility, during the pendency of the proceedings, to retain the consumers' property admittedly taken from the consumers without notice and in violation of due process.

Petitioners maintain that such action by a state court is repugnant to the due process guarantees of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

STATEMENT

This is a civil class action brought by the consumers of steam power supplied by a public utility, seeking a refund of rate increases claimed to have been exacted in violation of their fundamental rights to due process of law guaranteed under the Fourteenth Amendment of the United States Constitution.

Plaintiff-petitioner Building Owners & Managers Association of Metropolitan Detroit is a Michigan non-profit corporation headquartered in the City of Detroit, some of whose members are commercial consumers of steam power.

Plaintiff-petitioners Book Building Co., a Michigan limited partnership; Comford Investment Co., a Michigan

co-partnership; Fisher-New Center Co., a Michigan corporation; Fort Street Realty, a Michigan co-partnership; Guardian Building Corporation, a Michigan corporation; Washington Boulevard Buildings, Inc., a Michigan corporation; and Wineman Investment Co., a Michigan corporation, are all commercial consumers of steam power in the Detroit area.

Plaintiff-petitioner City of Detroit is a Michigan municipal corporation and is a consumer of steam power.

Plaintiff-petitioner County of Wayne is a Michigan municipal corporation and is a consumer of steam power.

Plaintiff-petitioner Frank J. Kelley is the duly elected and qualified Attorney General of the State of Michigan and represents the State of Michigan, its departments, commissions and agencies as consumers of steam power.

Defendant-respondent Michigan Public Service Commission is an administrative agency of the State of Michigan, created by the provisions of Act 3 of the Michigan Public Acts of 1939, as amended (Michigan Compiled Laws § 460.1 et seq; Michigan Statutes Annotated § 22.13(1) et seq) and having state statutory jurisdiction, authority and a duty to regulate public utilities within the State of Michigan.

Defendant-respondent The Detroit Edison Company is a Michigan and a New York corporation supplying various forms of energy to consumers in the metropolitan Detroit area. It is a public utility subject to rate and other regulation by respondent Michigan Public Service Commission and is the sole supplier of the steam power at issue in the instant case.

On May 7, 1970 respondent The Detroit Edison Company filed an application with respondent Michigan Public Service Commission seeking to increase rates covering the supply of steam power to approximately 1200 steam customers in the Detroit area (Michigan Public Service Commission case No. U-3678). Among the customers of Detroit Edison affected by the application were the petitioners herein, as

well as other numerous downtown and midtown Detroit building owners. (See Appendix A)

The only notification of the rate increase application pending before respondent Michigan Public Service Commission or of the hearings scheduled to be held thereon was a single letter sent to petitioner City of Detroit by respondent Michigan Public Service Commission. (See Appendix A)

On September 21, 1970, following a hearing participated in by respondents Michigan Public Service Commission and The Detroit Edison Company, respondent Michigan Public Service Commission issued its order authorizing respondent The Detroit Edison Company to increase its steam rates, effective on and after September 21, 1970, in approximately the amount requested, to wit, $2.8 million annually. None of the petitioners herein attended or participated in the aforementioned rate hearing.

On October 19, 1970 petitioners commenced this class action in the Ingham County Circuit Court for the State of Michigan seeking to invalidate the September 21, 1970 Michigan Public Service Commission order in case no. U-3678, alleging that the notice of hearing issued by respondents Michigan Public Service Commission and The Detroit Edison Company was not reasonably calculated to advise or inform respondent The Detroit Edison Company's steam customers of the pendency of a rate case which would substantially affect their interests.

On February 4, 1972, after preliminary proceedings in the Ingham County Circuit Court and after an unsuccessful interlocutory appeal to the Court of Appeals of the State of Michigan by respondent The Detroit Edison Company, petitioners filed a Motion for Summary Judgment, claiming that respondents' failure to give notice to petitioners rendered the steam rate order null and void. Petitioners also sought an immediate prohibition against further collection by respondent The Detroit Edison Company of monies pursuant to the respondent Michigan Public Service Commission's order in case no. U-3678 and sought a refund of all

sums theretofore collected by respondent The Detroit Edison Company pursuant to said order. In their brief in support of said motion, petitioners maintained that their principle contention in the case was that the notice sent by respondent Michigan Public Service Commission did not satisfy the requirements of fundamental due process as guaranteed by the United States Constitution.

On April 11, 1973 the Ingham County Circuit Court granted petitioners' Motion, in part, finding that respondents Michigan Public Service Commission and The Detroit Edison Company had in fact failed to provide petitioners with adequate notice of the steam power rate increase application and hearing thereon. The court held that the notice sent solely to the City of Detroit failed to satisfy the requirements of fundamental due process, as guaranteed by the United States Constitution and the Constitution of the State of Michigan. (See Appendix A)

On April 11, 1973 the Ingham County Circuit Court also remanded the matter to respondent Michigan Public Service Commission for the purpose of giving adequate notice to individual users of steam power and for the taking of further evidence and possible redetermination of the rates established by said respondent in its September 21, 1970 order. However, the court allowed the challenged rate increases to continue in effect.

On April 26, 1973 appellants filed a motion for rehearing entitled "Motion for Supplemental Order" requesting that the court (a) declare the September 21, 1970 order of respondent Michigan Public Service Commission reversed, set aside and held for naught and (b) order respondent The Detroit Edison Company to immediately refund all sums collected by it pursuant to said order.

On January 11, 1974 the Ingham County Circuit Court denied petitioners' Motion for Supplemental Order and refused to direct the requested refund. Respondent The Detroit Edison Company was ordered to post a $10 million bond and the case was remanded. (See Appendix B)

On January 30, 1974 petitioners filed a claim of appeal to the Court of Appeals of the State of Michigan and on March 4, 1974 petitioners filed an application for leave to appeal with the Court of Appeals of the State of Michigan. In both their claim of appeal and application for leave to appeal petitioners sought to have the Court of Appeals review the April 11, 1973 and January 11, 1974 Orders of the Ingham County Circuit Court on the grounds that the appealed steam rate order of respondent Michigan Public Service Commission found by the Circuit Court to have been issued in violation of due process of law was null and void, and accordingly, the retention of monies illegally collected thereunder by respondent The Detroit Edison Company presented a continuing violation of petitioners' due process rights.

On April 19, 1974 the Court of Appeals of the State of Michigan denied petitioners' application for leave to appeal. On May 9, 1974 the Court of Appeals for the State of Michigan dismissed petitioners' claim of appeal. (See Appendices C and D)

On May 10, 1974 the petitioners herein filed an application for leave to appeal before the Supreme Court of the State of Michigan. On July 24, 1974 the application for leave was denied. (See Appendix E)

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment of the United States Constitution provides:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

The notice requirement at issue in the instant case is an inviolate Fourteenth Amendment due process right:

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give

additional weight; . . ." *Roller* v. *Holly*, 176 US 398, 409 (1900)

The Ingham County Circuit Court correctly adhered to the precedents of the United States Supreme Court when it found, in its Opinion Granting Plaintiffs' Motion for Summary Judgment in Part (Appendix A), that respondents had violated the precepts of fundamental due process by issuing and implementing a utility rate-increase order after proceedings of which petitioners had no notice or opportunity to participate. However, the circuit court ignored the decisions of the United States Supreme Court hereinafter set forth when it refused to reverse and vacate the invalid order (Appendices A and B). The remand directed by the circuit court cannot cure the constitutionally defective rate order and further represents a continuing violation of petitioners' due process rights. Both the Michigan Court of Appeals and the Michigan Supreme Court have refused to grant petitioners a hearing to cure this Constitutional defect (Appendices C, D and E). Accordingly, this Court should grant review.

1. AN ORDER ENTERED WITHOUT NOTICE TO INTERESTED PARTIES, BEING IN VIOLATION OF FUNDAMENTAL DUE PROCESS, IS VOID.

Under the Fourteenth Amendment it is a well established proposition that no one can be personally bound by a decree in a case in which he neither appeared nor was served nor effectively made a party. Such an absence betokens a lack of jurisdiction and voids a decree entered in such defective proceedings. *Hanson* v. *Denckla*, 357 US 235 (1958).

In *Armstrong* v. *Manzo*, 380 US 545 (1965), the Supreme Court held that an adoption decree entered without notice to the natural father of an adopted child was *void*, of no effect, and incapable of being sanitized through a "remand" for additional testimony by the protesting father.

Similarly, in *United Gas Co.* v. *Mobile Gas Corporation*, 350 US 332 (1956), the Supreme Court held that where the Federal Power Commission erroneously permitted increased gas rates to go into effect, the new schedule filed by the gas company was a *nullity* insofar as it purported to change the existing rate.

In *Roller* v. *Holly, supra*, after finding there to be inadequate notice to a defendant in an action for judgment on certain promissory notes, the Supreme Court reversed the judgment of the Court in Civil Appeals which had affirmed the judgment of the local district court, on the grounds *"that the judgment obtained upon such notice was not binding upon the defendant"* (176 US at 413) (emphasis supplied). Likewise, in *McDonald* v. *Mabee*, 243 US 90 (1917), the Supreme Court maintained that judicial orders entered in proceedings where there has been defective service are *totally void:*

> ". . . an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the state as it is outside of it . . ." (243 US at 92)

See also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 US 306 (1950).

Accordingly, in the case at hand, it was incumbent upon the Ingham County Circuit Court to hold the steam rate order not binding upon the petitioners after the court had determined that the notice given to petitioners was inadequate. The court's failure to so hold enables respondent The Detroit Edison Company to retain petitioners' property following a judicial declaration that the property had been exacted in contravention of fundamental due process guarantees. Respondent The Detroit Edison Company is entitled to retain only those amounts which it was permitted to charge under the last *valid* rate order i.e. that which immediately preceded the order in rate case

U-3678. The rates in excess thereof, sanctioned by the order found to have been issued in violation of due process, should have been refunded.

2. A REFUND NEED NOT BE EXPRESSLY STATUTORILY PROVIDED BEFORE BEING GRANTED BY A COURT AS A MEANS OF RETURNING PROPERTY TAKEN IN VIOLATION OF DUE PROCESS.

Respondents heretofore have pointed to the failure of Michigan statutes regulating public utilities to expressly provide for a refund of illegally exacted rates as justification for respondent The Detroit Edison Company's retention of sums collected herein. The United States Supreme Court has held that a state agency, even in the absence of specific legislative enactments, is required to refund money collected in derogation of Constitutional requirements, and the courts will imply a refund procedure where none is statutorily provided. To hold otherwise would be in contravention of the Fourteenth Amendment. *Ward* v. *Board of County Commissioners of Love County, Oklahoma*, 253 US 17 (1920).

In the *Ward* case, a group of Indians brought suit in federal court seeking a refund of property taxes which had been levied against their land and collected. An Act of Congress had declared the original land grants exempt from taxation for a period of 21 years. Ten years later, Congress removed the exemption; however, this Court then held that Congress could not Constitutionally deprive the Indians of their exemptions within the 21 year period. Nonetheless, and in the face of the Supreme Court decision, the defendant county continued to levy and collect property taxes on Indian lands. The Supreme Court directed the county to cease collecting the taxes and held that there was a *Constitutional right to a refund.*

> "As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It

> is a well-settled rule that 'money got through imposition' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law independent of any statute, will compel restitution of compensation'. (Citations are omitted) *To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the state.*" 253 US 17, 24 (emphasis added)

In the present case, for the circuit court to declare that a rate order was issued without authority and in derogation of Constitutional rights, and at the same time allow respondent The Detroit Edison Company to keep sums collected under that invalid order, "is nothing short of saying that it (the respondents) could take or appropriate the property . . . (of the petitioners) arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment . . ." 253 US 17, 24 (parenthetical material added).

In *Baltimore & Ohio R. Co.* v. *United States,* 279 US 781 (1929), the Supreme Court had earlier reversed a decree of a three judge district court panel which had erroneously refused to vacate an order of the Interstate Commerce Commission by which the east side railroads had been required to absorb transfer charges on certain traffic moving west at St. Louis, Missouri. Subsequently, an east side railroad had applied to the district court for a decree in accordance with the Supreme Court mandate and restoration by the west side railroads of the amounts which the east side railroad had borne and paid under the order

because of the erroneous decree. On remand, the district court reversed its earlier decree and set aside the Commission's order, but refused to grant restitution. On appeal, the Supreme Court reversed, stating:

> *"The east side roads are entitled to restitution. The order should have been set aside in the first instance. . . .*
>
> "The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done. *Northwestern Fuel Co.* v. *Brock,* 139 US 216, 219. *Arkadelphia Co.* v. *St. Louis, S.W.R. Co., supra,* 145. *Ex Parte Lincoln Gas Co.,* 256 US 512, 516 (sic). *When the erroneous decree was reversed and the invalid order was set aside, the law raised an obligation against each of the west side roads to make restitution of the payments made by the east side roads in compliance with the order. . . .*
>
> *". . . It was the duty of the court to retain jurisdiction of the case, enter a decree that appellants are entitled to restitution, and refer the case to a master as prayed in appellants' motion. Ex Parte Lincoln Gas Co., supra,* 517." 279 US at 785-786 (emphasis added).

Restitution means restoration, and it requires that respondent The Detroit Edison Company restore what the petitioners have lost because of the failure of the Commission to enter a valid order in the first instance. *Baltimore & Ohio R. Co.* v. *United States, supra; Ex Parte Lincoln Gas & El. Co.,* 257 US 6 (1921); *Arkadelphia Mill Co.* v. *St. Louis S.W.R. Co.,* 249 US 134 (1919); and *Northwestern Fuel Co.* v. *Brock,* 139 US 216 (1891).

3. PROPERTY TAKEN IN VIOLATION OF DUE PROCESS MAY NOT BE RETAINED, NOTWITHSTANDING THE FACT THAT DUE PROCESS MIGHT OTHERWISE HAVE YIELDED THE SAME RESULT.

Respondent The Detroit Edison Company has urged that despite the alleged insufficiency of notice of the rate hearing, the rates determined thereat have yet to be shown to be substantively unreasonable. By virtue of its remand and concomitant preservation of the rate structure established by the challenged administrative order, the Ingham County Circuit Court espoused this argument that property taken in violation of due process rights may be retained where due process might otherwise have led to the same result. Such reasoning was rejected by the Supreme Court in *Coe* v. *Armour Fertilizer Works,* 237 US 413 (1915). There, it was held that a person is not precluded from complaining that the taking of his property was without the notice and hearing essential under the due process clause of the Fourteenth Amendment because, in his particular case, due process of law would lead to the same result because he had no adequate defense on the merits. A writ of execution issued without notice to the petitioner in that case was quashed immediately, rather than requiring petitioner to sustain his defense on the merits with respect to the underlying claim against him.

In this same vein, the Supreme Court in *Sniadach* v. *Family Finance Corporation of Bay View,* 395 US 337 (1969) voided a prejudgment garnishment issued without notice, on the grounds that it violated fundamental requirements of due process. In so doing, the Court rejected the argument that due process guarantees are somehow preserved by the circumstance of a later trial on the merits:

> "They (the garnisheed wages) may, it is true, be unfrozen if the trial of the main suit is ever had and the wage earner wins on the merits. But in the interim, the wage earner is deprived of his enjoyment of

> earned wages without any opportunity to be heard and to tender any defense he may have . . ." 395 US at 339 (parenthetical materials added).

In dismissing the argument that the subsequent trial on the merits will somehow ex post facto cure the prior due process violation in the form of inadequate notice, the Supreme Court repeated in *Sniadach* its earlier rule in *Mullane* v. *Central Hanover Bank & Trust Co., supra,* that the right to be heard, "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest" (395 US at 339).

The Court reaffirmed its *Sniadach* holding in *Fuentes* v. *Shevin,* 407 US 67 (1972), where it maintained that from the standpoint of the application of the due process clause it is immaterial that the deprivation may be temporary and non-final pending a hearing on the merits. Similarly, in *Bell* v. *Burson,* 402 US 513 (1971) at 542 the Supreme Court again stressed that due process rights to a hearing are meaningful only if the hearing occurs *before* any substantive administrative action is taken.

In the instant case, respondent Michigan Public Service Commission's granting of a rate increase order to respondent The Detroit Edison Company and the circuit court's allowance of the implementation of that rate order during the period *before* petitioners' hearing thereon, contravene the rule of *Bell* v. *Burson, ibid.* and represent a continuing violation of petitioners' due process rights.

4. AN ADMINISTRATIVE ORDER ENTERED WITHOUT NOTICE TO INTERESTED PARTIES SUFFERS THE SAME CONSTITUTIONAL INFIRMITY AS A JUDICIAL DECREE ENTERED WITHOUT NOTICE.

It cannot be argued that because the rate hearing in the instant case was an administrative rather than a judicial proceeding, the due process violations, in the form of inade-

quate notice and lack of hearing, do not per se void the administrative order. *Bell* v. *Burson, ibid.* involved state administrative proceedings. So too did *Londoner* v. *City and County of Denver,* 210 US 373 (1908). In the latter case, a municipal board of equalization issued special assessments to benefited property owners for already-completed street improvements, having afforded the property owners the opportunity to file written objections to the assessments but denying them an opportunity for a hearing on said assessments. The Supreme Court, having determined that fundamental due process requires a hearing *prior* to the issuance of such an administrative order (assessment), *voided* the assessments and specified that the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of the void assessments. So too, in the instant case, should the Ingham County Circuit Court have remedied the admitted due process violation by *voiding* the defective rate order and *refunding* the sums collected thereunder.

5. A REMAND WHICH WRONGFULLY SHIFTS THE BURDEN OF PROOF TO PETITIONERS AND FORCES PETITIONERS TO REBUT EVIDENCE ENTERED IN THEIR ABSENCE AT AN EARLIER PROCEEDING OF WHICH THEY HAD NO NOTICE, IS ITSELF CONSTITUTIONALLY DEFECTIVE.

Notwithstanding the foregoing cases, which clearly establish that the order of respondent Michigan Public Service Commission was void and that rate increases exacted from petitioners in reliance thereon should be returned, examination of the consequences of the circuit court's remand order betrays its inherent repugnance to petitioners' due process rights and illustrates why certiorari should be granted.

The case has been ordered back to respondent Michigan Public Service Commission for the giving of notice to petitioners and to enable petitioners to introduce their own

proofs on the rate question. The challenged rate order continues to be operative in the interim. Furthermore, the proofs and testimony heretofore introduced by respondent The Detroit Edison Company continue to be a part of the administrative record, and it becomes petitioners' burden to rebut the case entered in their absence. The violation of due process inherent in such a remand is that petitioners, already having been denied the opportunity to cross-examine respondents' witnesses and challenge the admissibility of respondents' exhibits, now have the burden of proof shifted to them. Petitioners are required to come forward and introduce evidence satisfactory to rebut a rate determination made in their absence and continuing in effect.

In *Armstrong* v. *Manzo, supra,* this technique of having an additional hearing to allow a petitioner to introduce his proofs as a means of curing the Constitutional defect of failing to provide the petitioner with notice of the original hearing affecting his rights, was expressly rejected by the Supreme Court. Pointing out that such an approach wrongfully shifted the burden of proof and forced the petitioner to overturn an order made in his absence, the Supreme Court held that the only proper remedy was to have the original court order *vacated:*

> "A fundamental requirement of due process is 'the opportunity to be heard'. *Grannis* v. *Orden,* 234 US 385, 394, 34 S.Ct 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." 380 US at 552

CONCLUSION

Petitioners pray that, in accordance with the decisions of the Supreme Court set forth above, the writ of certiorari be granted, the decisions of the lower courts be reversed, and respondent the Detroit Edison Company be ordered to immediately refund all steam rate increases collected pursuant to the invalid and unconstitutional September 21, 1970 steam rate increase order of respondent Michigan Public Service Commission.

Alternatively, petitioners pray that the writ of certiorari be granted and the case be set for hearing before this Court.

Respectfully submitted,

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